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DEPARTMENT OF THE INTERIOR

GEOLOGICAL SURVEY

1882

REPORT OF THE GEOLOGICAL SURVEY OF THE TERRITORY OF ARIZONA, MADE DURING THE YEAR 1882.

BY

JOHN W. GOWENLOCK,

CHIEF OF THE SURVEY.

WASHINGTON:

GOVERNMENT PRINTING OFFICE,

1883.

The following is a list of the publications of the Geological Survey of the Territory of Arizona, made during the year 1882. The publications are arranged in alphabetical order of the authors' names. The names of the authors are given in full, and the titles of the publications are given in full, and the year of publication is given in full. The names of the authors are given in full, and the titles of the publications are given in full, and the year of publication is given in full.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 482

A. J. PARETTA CONTRACTING CO., INC.,
Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

I

The Government argues in its brief that the holding of estoppel, with respect to petitioner's claim based on increased wages paid to carpenters, is sustained by the evidentiary findings of the Court of Claims (Government Brief, p. 9).

It was shown in the petition herein (Pet. 20-21) that the ultimate holding of estoppel was contrary to the evidentiary finding of the Court below that petitioner did not affirmatively agree to withhold claim for additional compensation in event the carpenters' wage rates was increased (Rec. 34). It was also shown in the petition (Pet. 20-21) that the principle of estoppel could not affect the duty of the Secretary of Labor under the Bacon-Davis Act to correctly determine the prevailing wage rate or limit the petitioner's right to rely on the proper performance of such duty.

II

The Government's contention that the original determination of the Secretary of Labor as to the carpenters' wage rate did not mislead petitioner (Gov't Brief, Page 9) is contrary to the finding of the Court below that petitioner used such rate in preparing its bid (R. 30) and it is also contrary to the contract provision that the wage rates specified therein shall be "deemed" to establish the minimum wages (R. 50), *i. e.*, the "prevailing" wages as required to be determined by the Bacon-Davis Act (Pet. 2, footnote 2).

It is stated in the Government's Brief (p. 11) that petitioner's claim is based on the assumption that the first determination of the prevailing wage rate by the Secretary of Labor was erroneous, and that such assumption is not supported by the finding of the Court below. This is not a correct statement of petitioner's position as stated in the petition (Pet. 19, 20). In the absence of error in the first determination, there was no authority in the Secretary of Labor to change the wage rate subsequent to the execution of the contracts. If there was error in the first determination, petitioner is entitled to recover the increased wages paid by it in excess of the rate prescribed in the first (or erroneous) determination, upon which it relied.

III

It is admitted in the Government Brief that petitioner was not required to provide fill for the purpose of changing the grade, and that providing fill was the only feasible method of protecting the piers against damage by cold (Gov't Brief, p. 14). Nevertheless, the Government argues in its brief, that under the general contract provision for protecting the work against damage by cold, petitioner was under a duty to provide fill not as "grading" but as "protection" (Gov't Brief, p. 14). Such a hair-splitting

result is contrary to the well-established principle discussed in the petition (Pet. 22) and not answered by the Government in its brief, that the explicit declaration in a Government contract of work to be omitted controls over a general provision in the same contract under which such work might otherwise be required. If there were no other reason for granting the writ herein, the situation on this item alone, as sought to be so tenuously distinguished by the Government, is sufficiently compelling to enforce the above principle so often applied by this Court, as shown by the cases cited in the petition (Pet. 22), with which decisions the judgment of the Court below is clearly in conflict.

IV

The Government seeks in its brief to escape the weakness of its position on petitioner's claim for compensation for the corrective work on the piers by the argument that petitioner failed to invoke the appeal provisions of Article 15 of the contract (R. 46) and was therefore precluded from raising this question in the Court below (Gov't Brief, p. 14).

In answer thereto it may first be stated that the dispute on this item involved the interpretation of the contract, which was a question of law and not a question of fact under Article 15 of the contract. Disputes as to questions of law were not required to be submitted to the contracting officer and head of the department before resort may be had to the Courts. Indeed, the Court below expressed and applied this principle in granting recovery to petitioner on its claim for increased laborers' wages (R. 53-54).

The Court below stated that "only disputes concerning questions of fact was the plaintiff required to submit to the contracting officer" (R. 53-54).

It is to be noted that the Government states in its brief (pages 6-7, footnote 1) that it did not consider petitioner's alleged failure to obtain a ruling from the contracting offi-

cer or to appeal to the head of the department on petitioner's claim for increased laborers' wages "of sufficient significance to warrant seeking a review by this Court."

The cases cited in the Government Brief on this point are inapplicable. In the cases of *U. S. v. Holpuch*, 328 U. S. 234, and *U. S. v. Blair*, 321 U. S. 730, Article 15 of the contract included all disputes "concerning questions arising under this contract" whereas, in our case, Article 15 refers only to disputes concerning questions of fact (R. 27).

In fact, petitioner did request findings of fact by the contracting officer, not only on petitioner's claim as to the piers, but also on petitioner's claim for the increased carpenters' wages (R. 32-33, 44-46). The contracting officer failed to make any findings, and merely denied petitioner's claims (R. 32, 35, 46). Petitioner was not required to appeal to the head of the department, before instituting suit, for several reasons as hereafter stated.

In the first place, there were no findings of fact from which an appeal could be taken.

Manufacturers Casualty Ins. Co. v. U. S., 105 C. Cls. 342;

Ericsson v. U. S., 104 C. Cls. 397, Cert. den. 327 U. S. 784.

The claims involved interpretations of the contract and applicable statutes and were therefore disputes as to questions of law and not as to questions of fact.

B. W. Construction Co. v. U. S., 97 C. Cls. 92;

McShain v. U. S., 88 C. Cls. 284, 299;

Green v. Foundation Co., 180 Misc. 976, 44 N. Y. S. (2d) 547;

Randall Construction Co. v. U. S., 2 C. C. F. 920, BCA #537, June 29, 1944.

The material facts are undisputed.

St. Louis Shipbuilding Steel Co., 4 C. C. F. 50, 272 BCA #177, June 14, 1946.

The burden was on the Government to show that the decision of the contracting officer was based on disputed facts and not on the law.

U. S. v. Johnson, 153 F. (2d) 846 (C. C. A. 9).

Conclusion

This case presents for consideration the important question as to the authority of the Secretary of Labor under the Bacon-Davis Act to modify his determinations as to prevailing wage rates incorporated in Government contracts and whether recovery may be had where damage is suffered by reason of reliance upon an erroneous determination by the Secretary of Labor, which questions have not heretofore been decided by this Court.

The case also presents a situation in which the Court of Claims has interpreted the provisions of a Government contract in conflict with the applicable decisions of this Court as to the effect to be given to a specific or express declaration in a Government contract of work to be omitted as against a general provision therein under which such work might otherwise be required.

These questions are of great public importance to contractors and to the Government in the bidding and performance of Government contracts.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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Dated: February, 1948.